Supreme Court, U.S.
FILED
MAY 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1080

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE BOARD OF EDUCATION OF
OKLAHOMA CITY PUBLIC SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 89,
OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, ET AL,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF INTERVENORS IN *CARLIN V. BOARD OF EDUCATION SAN DIEGO UNIFIED SCHOOL DISTRICT* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER FOR REVERSAL

Elmer Enstrom, Jr.
Counsel of Record
For *Amici Curiae*
In Pro Bono Publico
890 Knob Hill Drive
Post Office Box 723
Julian, California 92036
(619) 765-0520

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. BACKGROUND: DESEGREGATION CASES ARE UNIQUE	5
A. *Amici Curiae's* Presentation is Appropriate	5
B. History Leading to *Swann* Doctrine	7
C. The *Swann* Doctrine Does Not Favor Protracted Busing	9
II. COURT-EXTENDED RACIAL ASSIGNMENTS UNCONSTITUTIONALLY DISCRIMINATE AGAINST UNWILLING K-4 BYSTANDERS	11
III. COURT-EXTENDED DISCRIMINATORY ASSIGMENTS UNCONSTITUTIONALLY IMPAIR THE LIBERTY AND PRIVACY OF UNWILLING K-4 BYSTANDERS	17
CONCLUSION	19
APPENDIX	1A

TABLE OF AUTHORITIES

Cases: Page

Amer. Meat Institute v. Environ. Protect. Agcy., 526 F.2d 442 (7th Cir. 1975) 6

Austin Independent School District v. United States, 429 U.S. 990 (1976) 3,11

Bank of California v. Superior Court, 16 Cal.2d 516 (1940) 18

Board of Ed., Etc. v. Superior Court of Cal., 448 U.S. 1343 (1980) 12

Bob Jones University v. United States, 456 U.S. 922 (1982) 2

Bob Jones University v. United States, 461 U.S. 574 (1983) 2,4,5,16-17

Bolling v. Sharpe, 347 U.S. 497 (1954) . 13-14,19

Brown v. Board of Education, 347 U.S. 483 (1954) *(Brown I)* . . . . . passim

Brown v. Board of Education, 349 U.S. 294 (1955) *(Brown II)* 4,13-17

Carlin v. Board of Education, San Diego Superior Court No. 303,800 1-3,12,19

Crawford v. Board of Education, 17 Cal.3d 280 (1976) 6

Crawford v. Board of Education, 113 Cal.App.3d 633 (1980) 15

Crawford v. Board of Education, 458 U.S. 527 (1982) 6,12

TABLE OF AUTHORITIES--Continued

Page

Dowell v. Okl. City Public Schools, Ind. Dist 89, 677 F.Supp. 1503(W.D.Okl.1987) . . . . *passim*

Griswold v. Connecticut, 381 U.S. 479 (1965) . 4,18

Green v. County School Board, 391 U.S. 430 (1968) 8-10

Jackson v. Pasadena City School District, 59 Cal.2d 876 (1963) 6-7

Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1972) 3,4,8,17

Martin v. Wilks, 109 S.Ct. 2180,2185 (1989) . 4,18

Meyer v. Nebraska, 262 U.S. 390 (1923) 18

Monroe v. Board of Com'rs of City of Jackson, Tenn., 391 U.S. 452 (1968) 12

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 4,18

Plessy v. Ferguson, 163 U.S. 537 (1896) 7

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 16

Swann v. Board of Education, 402 U.S. 1 (1971) . . . . . *passim*

Constitutional Provisions:

California Constitution, Art. I, Sec. 7A 6

United States Constitution,

Amendment V, Due Process Clause . . 4,19

Amendment XIV, Equal Protection Clause . 7

Other Authorities: Page

Coleman, *A Scholar Who Inspired It Says Busing Backfired*, (Interview, The National Observer, June 27, 1975) 13

Coleman, *The Concept of Equality of Educational Opportunity*, reprint in *The "Inequality" Controversy*, Levine and Bane, Editors (Basic Books,1975) 13

Cox, *The Role of the Supreme Court in American Government* (Oxford Press, 1976) . . 15

Note, 51 Cal.L.Rev. 810 (1963) 6

Schwartz, *The Supreme Court*, (Ronald Press, 1957) 7

Warren, *Memoirs of Earl Warren* (Doubleday, 1977) 17

Wright, *Witkin on Appellate Court Attorneys*, 54 Cal.S.Bar J. 106 (1979) 9

BRIEF OF INTERVENORS IN *CARLIN V. BOARD OF EDUCATION* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER FOR REVERSAL

INTEREST OF *AMICI CURIAE**

Amici Curiae are Intervenors--opposing mandatory racial assignments--in the school desegregation case entitled *Carlin, et al.*, Plaintiffs, *v. Board of Education, San Diego Unified School District*, Defendant; *Groundswell, et al.*, Intervenors, No. 303800, Superior Court, San Diego County, California. This Court may take judicial notice of proceedings in the "Carlin" case.

The *Carlin* complaint, based upon *stare decisis* application of judicial decisions, was filed December 4, 1967, as a class action by certain black students, among others, versus the Defendant Board of Education to "integrate" the San Diego Unified School District. The class was described in the Order Determining Existence of Class Action, filed December 7, 1973, as--

> "All students attending the San Diego Unified School District and their parents and legal guardians who believe that said schools should be racially balanced, if necessary through court order."

Amici--including an association of persons called "Groundswell," and some individual students and their parents--intervened on December 15, 1980. They alleged in their complaint in intervention (pp. 8-10) that it was unconstitutional to assign the six intervening students and other students similarly situated, because of their race, to particular schools.

Amici later offered proof of signed petitions by 1856 District students, each "object(ing) to school authorities making

---

*This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

me, because of my race, go away from my neighborhood public school location to classes, without my consent and the consent of my parents, as a violation of my rights." Although these petitions were not received in evidence, their existence was established and an excerpt from an exemplar, marked as a part of *Carlin* Intervenors' Exhibit 6 for Identification, is annexed as the Appendix. See *Carlin* reporter's transcript of proceedings, July 16, 1981, pp. 190-197.

Although the *Carlin* Court has filed an "Order re Integration Plan/Final Order" on May 21, 1985, which like the trial court's order herein permits neighborhood school assignments, it has retained continuing jurisdiction (p.12). Thus, those having the status of *Amici* students remain subject to renewal of the contention that racial imbalance through causes not attributable to them call for their being racially reassigned beyond their neighborhood schools.

Here, as the dissent to the majority opinion at 890 F.2d 1483 on October 6, 1989, states, "this (Tenth Circuit) court retains jurisdiction and now orders the (Oklahoma City) school district to racially balance the elementary schools which will most certainly require busing." 890 F.2d at 1506. Should the panel majority's order be allowed to stand on this record, San Diego "anti-busing" students would become even more vulnerable to a request for racial balancing under the *stare decisis* doctrine.

The unwillingness of a number of students to be racially assigned away from their neighborhood schools may be inferred from the trial court's finding of the probability of "white flight" if a "busing" order is carried out. *Dowell v. Okl. City Public Schools, Ind. Dist. 89,* 677 F.Supp. 1503 at 1525 (1987).

Such "busing" assignments would be a form of racial discrimination, another form of which prompted the appointment of an *amicus curiae* in *Bob Jones University v. United States,* 456 U.S. 922 (1982). It raises issues sufficiently similar to those in *Bob Jones University v. United States,* 461 U.S. 574 (1983), to garner additional support therefrom for considering the following presentation by *Amici Curiae*.

SUMMARY OF ARGUMENT

All Oklahoma City students in grades K-4 have been allowed to attend their neighborhood schools since 1985 when the compulsory racial assignments to other schools, required by a 1972 desegregation plan, were ended by the school board. The District Court upheld the neighborhood school plan in June, 1987 (after a hearing in which it dissolved the 1972 desegregation decree), finding that during the plan's operation the school system has been "unitary" under the *Swann* Doctrine. *Dowell v. Okl. City Public Schools, Ind. Dist. 89,* 677 F.Supp. 1503,1519,1526 (1987). See*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1,32 (1971).

A divided three-judge panel of the United States Court of Appeals for the Tenth Circuit, over a vigorous dissent by Judge Bobby R. Baldock, reversed the district court decision and disapproved the neighborhood school plan. 890 F.2d 1483. The panel majority's decree will require the racial assignments of unwilling students to reduce the racial imbalance that the panel found to exist in some of the K-4 schools. See dissent, 890 F.2d at 1506.

The appellate desegregation decree is unique, to echo Justice Lewis F. Powell, Jr., because its burden--compelling children to leave their neighborhood and spend significant time each day being transported to a distant school--will fall upon innocent children and parents who are not charged with any offending action. *Austin Independent School District v. United States*, 429 U.S. 990, at 995, Footnote 5 (1976), and *Keyes v. School District No. 1, Denver, Colo.* (1972), 413 U.S. 189 at 247, Powell, J., concurring.

Amici complained in their intervention (pp. 9-10) that the imposition of such a burden upon the intervening students in *Carlin*, and other San Diego students similarly situated, would racially discriminate against them and unconstitutionally infringe upon their liberty and privacy. These grounds apply with added force here in that the permanent nature of the proposed burden upon five-to-ten-year-olds disregards the *Swann* remedy limitations referred to by the trial court. *Dowell,* supra, 677

F.Supp. at 1521. *Swann*, supra, 402 U.S. at 23,31-32.

When a mandatory elementary school assignment, under these conditions, is based solely upon the race of an unwilling child, that child is unconstitutionally discriminated against, regardless of the purpose, under the racially neutral language in *Brown v. Board of Education (Brown II)*, (1955) 349 U.S. 294, at 298 "that racial discrimination in public education is unconstitutional."

Court-ordered racial assignments away from one's neighborhood school impair the assigned children's liberty and privacy, to paraphrase Justice Powell in *Keyes*, supra, 413 U.S. at 247. They violate the Fifth Amendment of the Constitution as to those unwilling, innocent assignees of tender age unable to obtain continuing individual representation, who are not parties, regardless of its purpose. For those children have not had the hearing that Amendment requires by its clause that "(n)o person shall...be deprived of life, liberty, or property, without due process of law." Compare *Martin v. Wilks*, 109 S.Ct. 2180,2185 (1989).

This Court may consider these children's rights favorably. Compare *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. State of Connecticut*, 381 U.S. 479, 481 (1965); and *Bob Jones University*, supra, 461 U.S., at 593.

In summary, these Oklahoma City students are constitutionally protected from being racially discriminated against and having their liberty and privacy impaired by being mandatorily reassigned indefinitely to other than their neighborhood elementary schools for racial balance.

ARGUMENT

I. BACKGROUND: DESEGREGATION CASES ARE UNIQUE

A divided United States Court of Appeals three-judge panel for the Tenth Circuit has held unconstitutional the discontinuance of busing for racial balance and the adoption of a neighborhood school plan for K-4 students by petitioner because it has left some schools racially imbalanced. 890 F.2d 1483.

The trial court had dissolved the injunction under a 1972 desegregation decree requiring such busing, holding that the school system had retained a unitary status and that the neighborhood plan had been adopted without discriminatory intent. *Dowell*, supra, 677 F.Supp. at 1515-21.

Judge Baldock, in dissent, deplored the panel majority's failure to terminate jurisdiction "when a system has achieved and maintained unitary status." 890 F.2d at 1506. Fn. 1. The dissent emphasized Justice Powell's observation commencing his dissents in the 1979 Columbus and Dayton desegregation cases, that "25 years after *Brown v. Board of Educ. (Brown I)*... 'the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country.'" 890 F.2d at 1506. Fn. 1.

To meet the terms of the appellate order, *Amici* believe the trial court will have to order the petitioning school board to indefinitely reassign nonconsenting, nonparty elementary students, solely on a racial basis, beyond their neighborhood schools along the lines sought by Respondents at the trial. See *Dowell*, supra, 677 F.Supp. at 1524-25.

A. *Amici Curiae's* Presentation is Appropriate

The affirmative relief rendered by the panel majority adversely affects parties not joined in Oklahoma City, and others like the students in San Diego and elsewhere by virtue of the *stare decisis* doctrine. And it is inconsistent with the national policy against racial discrimination in education, as set forth in *Bob Jones University*, supra, 461 U.S. at 593. These

exceptional circumstances permit *Amici* to present issues beyond that of the impact of "white flight" upon the litigants. Compare *Amer. Meat Institute v. Environ. Prot. Agcy.*, 526 F.2d 442, at 449 (7th Cir. 1975).

Contentions by *amici curiae*, raised in behalf of nonparty students, have been considered in desegregation cases. A key pronouncement in the seminal California case of *Jackson v. Pasadena City School Dist.*, 59 Cal.2d 876, at 881, rendered June 27, 1963, pertained to school district responsibility for affirmative integration in schools in addition to the defendant Pasadena district:

> "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."

Footnote 5 in Note, 51 Cal.L.Rev. 810 (1963) points out that the complaint in *Jackson*, supra, --

> "was drawn on the theory of affirmative segregation and in the intermediate appellate court, counsel for plaintiff expressly denied that he was advocating affirmative integration. 210 A.C.A. at 658, 16 Cal.Rptr. at 665. The question was not argued in the briefs of either party. Affirmative integration was urged, however, in two *amici curiae* briefs."

This dictum, under the *stare decisis* doctrine, became the basis of the decision in 1976 in *Crawford v. Board of Education*, 17 Cal.3d 280, which decreed affirmative integration (which continues in effect except as to "busing") in California without the showing of *de jure* segregation required by federal decisions. The "busing" authorized by *Crawford* was disallowed by a 1979 "anti-busing" amendment to Section 7A, Article I, of the California Constitution, ultimately upheld in *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, at 533 (1982).

Like the *amici* in *Jackson*, supra, *Amici* here are presenting underlying issues involving nonparties, which may be entertained favorably.

B. History Leading to the *Swann* Doctrine

In 1896, the United States Supreme Court held in *Plessy v. Ferguson*, 163 U.S. 537, that the segregation of the races in transportation facilities did not violate the Constitution so long as the facilities were equal. The majority opinion rationalized that any discrimination felt by black persons assigned to separate facilities, since they were equal to those used by whites, was "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U.S. at 551.

Justice John Marshall Harlan (I) vigorously dissented, and his rationale is summarized by Professor Bernard Schwartz in *The Supreme Court* (Ronald Press, 1957) at page 269:

> "Yet, even if the *Plessy* Court were correct in its assumption that segregation is not discrimination, that would not make its doctrine consistent with the equal protection clause. For that clause bars the states from making legal distinctions that are not supported by reasonable legislative classifications, and, as already emphasized, classification on the basis of race must be deemed irrational. Our Constitution, to use the apt description of the dissenting Justice in the Plessy case, is color-blind; it neither knows nor tolerates classification on racial grounds."

Plessy was overruled in 1954 when *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 495, declared that "in the field of public education the doctrine of 'separate but equal' has no place," and that by forcing the black plaintiffs to attend separate schools solely because of their race, the respondents denied them equal protection of the laws under the Fourteenth Amendment to the Constitution. In *Brown I*, the Court was considering the complaints of black children that they were discriminated against by being segregated solely because of

their race in separate public schools administered by the respondent school authorities under the laws of Kansas, South Carolina, Virginia and Delaware, respectively.

Brown I agreed with Justice Harlan I as to the unconstitutionality of such actions under state laws permitting or mandating them. However, it did not mention the Harlan dissent and tended to focus upon their effect (segregation) rather than the acts of discrimination. *Brown I* was initially construed as negative in nature, calling only for state neutrality, as explained by Justice Powell in his concurrence in *Keyes*, supra, 413 U.S. 189 at 220:

> "It was impermissible under the Constitution for the States, or their instrumentalities to force children to attend segregated schools. The forbidden action was *de jure*, and the opinion in *Brown I* was construed--for some years and by many courts--as requiring only state neutrality, allowing 'freedom of choice' as to schools to be attended so long as the State itself assured that the choice was genuinely free of official restraint."

Justice Powell goes on to say in *Keyes* that the doctrine of *Brown I*, as amplified by *Brown II*, did not retain its original meaning:

> "In a series of decisions extending from 1954 to 1971 the concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative state action to desegregate school systems. The keystone case was *Green v. County School Board*, 391 U.S. 430, 437-438... (1968), where school boards were declared to have 'the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" 413 U.S. 220.

Thus, Justice Powell explained, the affirmative-duty concept articulated in a rural setting in *Green* flowered in *Swann v. Charlotte-Mecklenburg Board of Education*, supra, into a new constitutional principle of general application to large

urban areas as well.

C. The *Swann* Doctrine Does Not Favor Protracted Busing

A truism in the American system of justice is that it is delegated to the counsel of the parties the task of shaping the issues which are brought before the appellate courts. Edward M. Wright, *Witkin on Appellate Court Attorneys*, 54 Cal.St.Bar Journal 106 (1979).

The issues were shaped in *Brown, Green* and *Swann*--relied on for judicially-ordered busing of bystanders--by the counsel for the only parties to those actions, namely, the minority plaintiffs versus the defendant school authorities.

In *Swann*, a desegregation plan had been approved for a large urban district by the District Court in 1965 based on geographic zoning with a free transfer provision, leaving some schools racially imbalanced. 402 U.S. at 6,7 (1971).

After the decision in *Green* and companion cases, the *Swann* plaintiffs moved in September, 1968, for further relief based on those cases. The District Court then in effect required a plan desegregating all the schools, including the elementary schools, to be accomplished by busing students beyond their neighborhood schools so that the student bodies throughout the system would range from 9% to 38% black. Id. at 7-11.

This Court noted that **all the parties agreed** (emphasis by *Amici)* that "in 1969 the system fell short of achieving the unitary system that those (*Green* and companion) cases require;" but that the board..."reiterated its view that the plan was unreasonable." Id. at 7,11.

Dealing with the facts and issue thus presented to it, this Court stated:

> **"On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable..." Emphasis

supplied. Id. at 32.

However, the Court also indicated the temporary nature of the judicial role.

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decision in *Green* and *Alexander*.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." Id. at 31,32.

When this Court was considering the reasonableness of the *Swann* plan the whites were a majority of 71% in the Charlotte school system. 402 U.S. at 6. In Oklahoma City, the whites are becoming a minority (from 73% in 1969 to 47% in 1986); and the rest--blacks (40% in 1986) and others classified as "minorities" (13% in 1986)--are a emerging majority, (from 27% in 1969 to 53% in 1986), which will accelerate with expanded busing. *Dowell*, supra, 677 F.Supp. at 1509, 1525.

The absence of "anti-busing" students as parties in *Swann* claiming a constitutional right not to be racially bused from their neighborhood schools led to a lack of reference to that right in considering the board's claim the busing plan was unreasonable.

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process... It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann*, supra, 402 U.S. at 31,32.

Consideration of the bystanders' rights under the different circumstances in this case is warranted in the light of the *Swann* Court's statement that "(a)bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." Id. at 28.

II. COURT-EXTENDED RACIAL ASSIGNMENTS UNCONSTITUTIONALLY DISCRIMINATE AGAINST UNWILLING K-4 BYSTANDERS

> "(A) desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather upon innocent children and parents."

So Justice Powell concluded in Footnote 7 in concurring in *Austin Independent School District*, supr., 429 U.S. at 995.

The authority for burdening innocent children under the desegregation decree below rests upon precedents interpreting *Brown v. Board of Education*. As shown, these precedents were established in cases in which "anti-busing" students were not parties and their rights were not individually articulated. That there are many such objecting students of various races is evidenced by their actions when the reversal of a Los Angeles Superior Court's busing order became effective on April 20,

1981. Among about 7,000 students immediately returning to their neighborhood schools for the few remaining weeks of the school year were 4,300 "minority" students. *Crawford*, supra, 458 U.S. at 534, Fn. 10. Here, the dissent noted support of the neighborhood plan by two black parents, one of whom had collected 400 signatures favoring it. 890 F.2d at 1531. Fn. 25.

The unique position of these children is pointed out in terms of their parents' feelings by the *Carlin* Court in its Memorandum Decision and Order on March 9, 1977:

> "There is a substantial percentage of minority parents, as well as majority parents, who prefer to have their children attend neighborhood schools (footnote omitted). Most 'Hispanics' (41% of the minority school population) do not want their children sent to 'Anglo' schools where they will not have the security, fellowship and bilingual program of the neighborhood school. A substantial number of black parents also object to 'busing' for various reasons. These parents have not had an opportunity to be heard in these proceedings..." Page 21.

And school board attempts to present nonparty views by arguing, for instance, "flight by whites," if bused, have been considered irrelevant because "the vitality of these constitutional principles (justifying busing) cannot be allowed to yield simply because of disagreement with them." *Monroe v. Board of Com'rs of City of Jackson, Tenn.*, 391 U.S. 452,459 (1968).

Consequently, "anti-busing" students have been treated as "elements" in school desegregation cases in the manner described by then-Justice William H. Rehnquist in his order denying the request of the school board for a stay of a "busing" order in *Board of Ed., Etc. v. Superior Court of Cal.* (1980) 448 U.S. 1343 at 1348:

> "...The Board's primary contention here is that 'white flight,' which all parties concede has taken place in the school district, will accelerate if this plan is put into effect... Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve the optimal use of white students in the schools so that the maximum numbers of schools may be desegregated.
>
> "I find this analysis somewhat troublesome, since it puts 'white' students much in the position of textbooks, visual aids, and the like--an element that every good school should have. And it appears clear that this Court, sooner or later, will have to confront the issue of 'white flight' by whatever term it is denominated..."

Since the decision of the Court of Appeals below raises the specter of "white flight," it is appropriate to confront that issue in the broad sense both of the meaning of that term and of the holding in *Brown v. Board of Education*.

Dr. James A. Coleman, senior author of the 1966 *Equality of Educational Opportunity Survey*, points out that the flight from city schools beyond the reach of mandatory busing orders, which accelerates when blacks begin outnumbering whites, has included "middle-class" blacks as well as whites. *A Scholar Who Inspired It Says Busing Backfired*. The National Observer, June 27, 1975, pp. 1,18.

Dr. Coleman describes the actual decision in *Brown* as "in fact a confusion of two unrelated premises: this new concept, which looked at results of schooling, and the legal premise that the use of race as a basis for school assignment violates fundamental freedoms." *The Concept of Equality of Educational Opportunity*, reprinted in Part III of *The "Inequality" Controversy*, Donald N. Levine, Mary Jo Bane, Editors (Basic Books, 1975), Page 206. This is a fair description when *Brown I* and *Brown II* are read together with *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The "new concept" is derived from the initial answer to the question in *Brown I* whether "segregation of children in public schools solely on the basis of race even though the physical facilities may be equal deprive(s) the children of the minority group of equal educational opportunities?" 347 U.S. at 493.

The Court's immediate answer was that such segregation, with the sanction of law, had a detrimental effect upon their educational opportunities, as denoting their inferiority, having the tendency to retard their educational and mental development, and depriving them of some of the benefits they would receive in a racially integrated school system. This is social in nature because it rests primarily upon evidence then available from the social sciences cited in *Brown I*, 347 U.S. at 494, Fn. 11.

But *Brown* rests also on the legal premise stated in racially-neutral language in *Brown II* that "(t)he opinions (of *Brown I* and *Bolling)*... **declaring the fundamental principle that racial discrimination in public education is unconstitutional,** are incorporated herein by reference." 349 U.S. at 297. (Emphasis added.) It is too narrow a reading of *Brown* to consider that "racial discrimination in public education is unconstitutional" only in terms of detrimental result to a particular minority perceived primarily, if not entirely, from their ratio to students of other races in some schools of a school system.

Bolling found that the separation of black plaintiffs from whites in the District of Columbia, which could be accomplished only by the use of racial classifications, was so unjustifiable as to deprive plaintiffs of their liberty in violation of the Due Process Clause of the Fifth Amendment. *Bolling*, supra, 348 U.S. at 498-9. The use of racial classifications, which *Bolling* referred to (348 U.S. at 498) and disapproved, was no less a factor in accomplishing the separation of "minority" students in Kansas, Delaware, South Carolina and Virginia, as was recognized in *Brown II* by the incorporation of *Bolling*.

Brown II ruled that the district courts were to supervise the school districts involved in all three decisions in their "transition to a system of public education freed of racial discrimination." 349 U.S. at 299. This consistent use of racially-neutral language in *Brown II* proscribing racial discrimination emphasizes *Brown's* legal premise. It is distinguishable from *Brown's* social premise because its major influence are principles which bind the judges as well as the litigants, and which apply uniformly to all persons not only

today but yesterday and tomorrow. See, generally, Archibald Cox, *The Role of the Supreme Court in American Government* (Oxford Press, 1976), pp. 109-113.

The two premises are compatible in *Brown I* because the unconstitutional racial separation and consequent detriment suffered by those so separated was caused by a violation of the legal premise that "racial discrimination in public education is unconstitutional..." *Brown II*, 349 U.S. at 297.

However, the social premise is not applicable here because of changes in the conditions from those in *Brown*. Among the changes, in addition to eliminating the type of deliberate racial separation condemned by *Brown*, are the many continuing affirmative remedial steps to integrate the system set forth by the trial judge. *Dowell*, 677 F.Supp. at 1522-24 (1987).

Another change is the progressive outnumbering of whites by "minorities" in Oklahoma City. The *stare decisis* applicability of *Brown's* social premise when whites became significantly outnumbered was questioned by a California Court of Appeal in Los Angeles, after noting in*Crawford v. Board of Education*, 113 Cal.App.3d 633,642(1980) that the school district was 53.6% white in 1968:

> "That (outnumbering) of course is the existing situation in the District, where white students are now a minority in that they comprise 23.7 percent of the total student population and 16.1 percent of grades K-3. Yet for the purposes of applying the legal principles related to school segregation, whites are still designated as the 'majority,' and segregation is viewed in terms of the minorities, or any one of them, being isolated from whites." 113 Cal.App.3d 633 at 648 (1980).
>
> "That approach appears to be a hangover from the historic situation in some areas of the county which produced the background against which the decision in *Brown v. Board of Education*, supra, was rendered.
>
> "The wisdom of, or the need to, perpetuate that

approach here is questionable since, when considered in terms of the ethnic composition of the Los Angeles Unified School District, it appears to denigrate the dignity and capability of the minority students. In effect, it implies that ethnic 'minority' children, even when they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students." Id., Footnote 3.

The cause of the objectionable result found in *Brown* was racial busing of students like complainant Brown past their neighborhood schools for the social purpose of racial separation. But in reliance upon the social premise, more is now sought than allowing such students to attend their neighborhood schools, or to attend other schools voluntarily for integrative purposes, and continuing other integrative programs. What is sought is that the petitioning school authorities come full circle and reinstate racial busing of elementary students, some being no more willing than complainant Brown, past their neighborhood schools for the social purpose of racial mixing.

Under these facts, the equal protection guarantee to all persons does not entitle Respondents to a degree of protection greater than that accorded other students. *Regents of University of California* v. *Bakke*, 438 U.S. 265, at 295 (1978).

The interests advanced by *Amici* may be compared to those advocated by the *amicus* in *Bob Jones University*, supra, 461 U.S. 574. Bob Jones University, a private religious university, had a policy prohibiting interracial dating and marriage by its white and black students. This was racially discriminatory, according to Internal Revenue Service policy, which formed the basis for denying a claimed tax exempt status. Id. at 581.

This Court pointed out that there is a national policy against racial discrimination in education, and that the Government has a fundamental, overriding interest in erradicating it. Id. at 593,604. The Court found that the university policy was a form of racial discrimination and upheld the *amicus'* position in support of the judgment below finding

the IRS policy was properly applied to Bob Jones University. Id. at 605.

Judicially-assigning unwilling bystanders to particular schools solely on the basis of their race is no less a form of racial discrimination than was the policy of Bob Jones University. Elements adding to the persuasiveness of this argument which were not present in the *Bob Jones* case, are that the racial discrimination here is to be imposed under court duress (1) by public officials (2) in a public school system (3) upon students of tender age whose attendance is compelled.

Racial assignments of unwilling Oklahoma City K-4 students violate *Brown's* legal premise, applying to them in 1985, today and tomorrow, as restated by Chief Justice Earl Warren in *The Memoirs of Earl Warren* (Doubleday, 1977) at pages 287-88:

"Again the Court was unanimous in its decision of May 31, 1955, reaffirming its earlier decision of May 17, 1954, by asserting the fundamental principle that **any kind** of racial discrimination in public education is unconstitutional, and that all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." (Emphasis by *Amici*.)

III. COURT-EXTENDED DISCRIMINATORY ASSIGNMENTS UNCONSTITUTIONALLY IMPAIR THE LIBERTY AND PRIVACY OF UNWILLING K-4 BYSTANDERS

"Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and privacy." Justice Powell, concurring, in *Keyes*, supra, 413 U.S. at 247.

For some thirteen years black students (in K-4 grades) and white students (in 5th grade) were assigned to schools for racial balance in Oklahoma City under the Finger plan until 1985 when the board allowed K-4 students to return to their neighborhood

schools. The appellate decision below would require resumption of K-4 racial school assignments of students, including nonconsenting, white bystanders, away from their neighborhood schools.

The law does not permit the courts to render the type of affirmative relief which injures and affects the interests of third parties not joined in the action. *Martin*, supra, 109 S.Ct. at 2185. Compare *Bank of California v. Superior Court*, 16 Cal.2d 516 (1940).

This Court may take judicial notice of the injury suffered by unwilling, affected students and their inability to individually intervene and continuously assert their constitutional rights. Nor are they required to. *Martin*, supra, 109 S.Ct. at 2185. This Court may consider their rights under the circumstances. Compare *Griswold*, supra, 381 U.S. at 481, and *Pierce*, supra, 268 U.S. 510.

Children are not mere creatures of the State. They are constitutionally protected from governmental action infringing upon their liberty and privacy. *Pierce*, supra, 268 U.S. at 535.

Mandatory racial assignments of five-to-ten-year-olds away from their home/neighborhood school environs are analogous to the assignments of seven-year-olds in ancient Sparta referred to in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In *Meyer*, this Court prevented Nebraska from prohibiting foreign-language instruction in its schools, making the point that a desirable end cannot be promoted by prohibited means by this analogy:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any

> Legislature could impose such restrctions upon the people of a state without doing violence to both letter and spirit of the Constitution." 262 U.S. at 402.

The Fifth Amendment provides that "no person shall be deprived of life, liberty, or property, without due process of law." This Court, in construing that clause, pointed out in *Bolling*, supra, 347 U.S.at 498, that discrimination "may be so unjustifiable as to be violative of due process." And racially assigning unwilling Oklahoma City students to particular elementary schools is as unjustifiable under the circumstances here as were the racial assignments of District of Columbia students in *Bolling*.

Unwilling bystanders racially reassigned by the judicial arm of the United States would suffer an impairment of liberty like that of the students in *Bolling*. They are entitled to a ruling of unconstitutionality such as the *Bolling* students received after a hearing. A fortiori, since the deprivation of liberty and privacy is sought to be imposed upon nonparty Oklahoma City students **without their being heard** as required by the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

For these reasons, the Intervenors opposed to judicially ordered assignment of students on a racial basis in *Carlin v. Board of Education, San Diego Unified School District*, as *amici curiae*, respectfully support the Petitioner and the neighborhood school plan.

Respectfully submitted,

Elmer Enstrom, Jr.
Counsel for *Amici Curiae*
In Pro Bono Publico
890 Knob Hill Drive
Post Office Box 723
Julian, California 92036
(619) 765-0520

Dated: May 8, 1990

APPENDIX

STUDENTS

(Child, living in District, subject to busing, who can read and understand the statement below

TO THE BOARD OF EDUCATION, SAN DIEGO UNIFIED SCHOOL DISTRICT:

I, the undersigned child, residing in the San Diego Unified School District, respectfully object to school authorities making me, because of my race, go away from my neighborhood public school location to classes, without my consent and the consent of my parent(s), as a violation of my rights.

NAME	AGE	ADDRESS	DATE
Lisa C.	12	[illegible] 92124	Feb 19, 1981
Angie C.	10	"	Feb 19, 1981
Cheryl [illegible]	11	[illegible]	Feb 19, 81
Erin [illegible]	11	[illegible] 92124	Feb 19, 81
Karen [illegible]	11	[illegible] 92124	Feb 20, 81
Sandy [illegible]	11	92124	Feb 20, 81
Brent [illegible]	11	11 Lane 92124	Feb 20, 81
[illegible]	[illegible]	[illegible]	[illegible]
Stephan [illegible]	[illegible]	[illegible] 92124	Feb 20, 81
Ricky G.	12	[illegible]	Feb 23, 81
Krista F.	11	[illegible] 92124	Feb 23, 81
Jeri [illegible]	11	[illegible] 92124	Feb 23, 81
Lori [illegible]	11	[illegible] 92124	Feb 23, 81
Cheryl [illegible]	12	[illegible]	Feb 23, 81